Supreme Court, U.S.
FILED
APR 21 2000
CLERK

No. 99-1538

IN THE

Supreme Court of the United States

SHEILA TARANTO, d/b/a TUNDRA TAXI,

Petitioner,

v.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the actual malice standard established in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), protect government speech?

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OPINIONS BELOW

The decision of the Alaska Supreme Court is reported at *Taranto v. North Slope Borough*, 992 P.2d 1111 (Alaska 1999) ("Taranto II"). *See also* Pet. App. A, pp. 1-12.

The order determining the law of the case and granting summary judgment to the North Slope Borough by the Alaska Superior Court for the Second Judicial District at Barrow, Alaska is unpublished. *See* Pet. App. B, pp. 13-27.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the decision of the Alaska Supreme Court in *Taranto II* under 28 U.S.C. § 1257(a) because that decision was based upon independent and adequate state law grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), and discussion below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. Alaska Const. art. I, § 5

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

III. Alaska Stat. § 09.50.250

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought under this section if the claim

. . . .

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

IV. Alaska Stat. § 09.65.070

(a) Except as provided in this section, an action may be maintained against a municipality in its corporate character and within the scope of its authority.

. . . .

> (d) An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim
>
> . . . .
>
> (2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused.

STATEMENT OF THE CASE

I. Background

Petitioner Sheila Taranto ("Taranto") operated a taxi business in Barrow, Alaska in 1991. At that time Evelyn Donovan ("Donovan") was the Borough Clerk for Respondent North Slope Borough ("NSB"). NSB is a unit of local government established pursuant to the Alaska Constitution and Alaska Statutes. Alaska Const. art. X, § 3; Alaska Stat. § 29.05.031.[1]

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1. NSB is the largest municipality in the United States in terms of land mass, encompassing 89,000 square miles of Alaska land north of the Arctic Circle. It has a small population of approximately 7,500 people, nearly seventy percent of whom are Inupiat Eskimos. Of this number, more than half (approximately 4600 people) live in Barrow, the northern most city in the United States and the NSB seat of government. The remainder live in several villages spread throughout the NSB. *See generally* North Slope Borough 1998/99 Economic Profile and Census Report, North Slope Borough Department of Planning and Community Services.

Sometime in the fall of 1991, Donovan drafted a petition with lines for signatures under the following statement:

> We, the undersigned, have knowledge of Sheila Taranti [sic], owner of Tundra Taxi, to sell liquor, marijuana and cocaine. This will authorize Public Safety to interview us to document her illegal sale of liquor, marijuana and cocaine or attest to the fact that I have been a witness to her illegal activities.[2]

The petition was placed in the front reception area of the NSB Administration and Finance Building for approximately one month. Twenty-two persons signed the petition and Donovan thereafter delivered it to the NSB Public Safety Director.

II. Taranto's Suit and First Appeal to the Alaska Supreme Court

In January, 1992, Taranto filed a Complaint for Defamation alleging that NSB, through its agents, "caused the composition, writing and printing of a certain petition, containing false and defamatory matter concerning Plaintiff, namely, her selling liquor, marijuana and cocaine." Taranto further claimed that a second defamatory petition was also published, alleging that she engaged in acts of prostitution. She sought an award of compensatory damages for injury to her reputation, pain and suffering incident thereto, and economic losses to her taxi business. She also requested an award of punitive damages.

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2. The petition itself did not accuse Taranto of illegal conduct, as she claims in her brief. Pet. Br., p. 2. Rather, the petition gave citizens the opportunity to provide information concerning any illegal conduct.

NSB answered the complaint and asserted several affirmative defenses, including: (1) lack of legal responsibility for the individual acts alleged; and (2) lack of requisite "actual malice." In December, 1992, NSB moved for summary judgment on the first of these defenses — the question of its legal responsibility for the alleged acts of Donovan and certain other NSB employees about which Taranto complained. Alaska Superior Court Judge Michael I. Jeffery granted the motion.

Taranto appealed and the Alaska Supreme Court reversed, concluding that genuine issues of material fact existed as to NSB's liability for its employees' acts -- under both direct and vicarious theories. *See Taranto v. North Slope Borough*, 909 P.2d 354, 360 (Alaska 1996) ("Taranto I").

III. Remand and Taranto's Second Appeal to the Alaska Supreme Court

After remand, NSB filed a motion to establish the law of the case and a related motion for summary judgment on the second affirmative defense. NSB first sought an order establishing that Taranto must prove "actual malice" on its part in order to prevail on her defamation claim. Assuming the success of that motion, NSB concurrently sought summary judgment on the question of its actual malice.

On March 17, 1997 Judge Jeffery issued a memorandum and order on the pending motions, which dismissed Taranto's defamation claim against NSB. Pet. App. B, pp.13-27. Relying upon *West v. Northern Publishing Company*, 487 P.2d 1304 (Alaska 1971), and related Alaska case law on defamation, he held that Taranto was required to prove actual malice in order to prevail because the alleged defamatory statements involved matters of "public or general concern."

Pet. App. B, pp. 20-21. *See also West*, 487 P.2d at 1305-06 (applying the "public concern" doctrine).[3] Judge Jeffery found that Taranto presented no evidence of actual malice by NSB.

> Taranto opposes the motion . . . on the argument that the actual malice standard is in applicable [sic]. Nowhere does Taranto allege that the Borough, or its employees, knew the allegations of the petition were false or entertained serious doubts about the validity of the petition.

Pet App. B, p. 24. As such, judgment was entered against Taranto on April 3, 1997.

Taranto once again appealed to the Alaska Supreme Court. She asserted that the Superior Court erred in requiring proof of actual malice by NSB. Specifically, Taranto argued

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3. The *West* court relied upon Justice Brennan's conclusion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971):

> We thus hold that a libel action . . . by a private individual . . . for a defamatory falsehood . . . [involving] an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 52 (footnote omitted). *See West*, 487 P.2d at 1305-06. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court rescinded the *Rosenbloom* "public concern" doctrine in favor of a "public figure" analysis. *Id.* at 345-48. However, *Gertz* specifically reserved to the states the right to retain such a standard under state law. *Id.* at 347-48. The Alaska Supreme Court has steadfastly taken that path, based upon the common law privilege discussed below. *See Mount Juneau Enters., Inc. v. Juneau Empire*, 891 P.2d 829, 837-38 (Alaska 1995).

that governmental units do not enjoy the protection of the First Amendment or the Alaska constitutional free expression clause and, therefore, the "actual malice" standard should not be required in suits against them, regardless of Alaska's "public concern" doctrine.

NSB argued in response that governmental speech should be afforded protection under both the United States and Alaska constitutions and, as such, the "actual malice" standard should apply to suits against the government on matters of public concern. Alternatively, NSB argued that conditional common law privileges, previously recognized by the Alaska Supreme Court, effectively reach the same result.

On December 17, 1999 the Alaska Supreme Court issued the decision which is the subject of the present Petition for a Writ of Certiorari ("Petition"). While noting that controversy exists concerning whether government speech is protected by the First Amendment, the court completely by-passed the constitutional question raised by the parties.

> We need not decide here whether the United States or Alaska constitutions protect government speech, because this court has held that the common law confers a conditional privilege on speech addressing matters of public health and safety. We do not need to consider whether a constitutional privilege applies if we conclude that a common law privilege applies. Undoubtedly the speech attributed to the borough here dealt with matters of public health and safety.

Taranto II, 992 P.2d at 1114 (footnote omitted). The Alaska Supreme Court identified two separate and distinct common

law privileges which applied to the allegedly defamatory petitions. *Id.* at 1114-15. Having concluded that the government speech in question was conditionally privileged, the Court went on to affirm the Superior Court's decision that Taranto had failed to present competent evidence of "actual malice" sufficient to defeat either privilege. *Id.*

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review The Decisions of State Courts Which Are Based Upon Independent and Adequate State Law

Taranto seeks review from this Court pursuant to 28 U.S.C. § 1257(a) which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Pet. Br., p. 1.

The Court has long held that its statutory jurisdiction does not extend to the review of state court conclusions on state law issues. Justice Jackson's opinion in *Herb v. Pitcairn*, 324 U.S. 117 (1945), is often cited in this regard:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164; *Fox Film Corp. v. Muller*, 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-26.

Justice Brennan opined that these "state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions." Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977) (footnote omitted).

More recently, in *Michigan v. Long*, 463 U.S. 1032 (1983), Justice O'Connor noted:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions,

> have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . If the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41.

If *Taranto II* is grounded in independent and adequate principles of Alaska law, Taranto's Petition must be denied for lack of jurisdiction.

II. The Decision of the Alaska Supreme Court in *Taranto II* Was Based Upon Independent and Adequate State Common Law Privileges

In *Fairbanks Publishing Company v. Francisco*, 390 P.2d 784 (Alaska 1964), the Alaska Supreme Court held that persons acting in the public interest are afforded certain privileges against defamation claims.

> The law of defamation embodies the important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks. But there is a well established counter policy that in certain situations there is a paramount public interest permitting persons to speak or write freely without being restrained by the possibility of a defamation action. In such situations the person writing or speaking is said to enjoy a privilege.

> Two general types of privilege are recognized by the law. They are: absolute and conditional or qualified. On the ground that it is in the public interest to do so, judicial officers, attorneys, witnesses, jurors, legislators, government executive officers and others are accorded the absolute privilege of publishing false and defamatory matter within certain limitations. Numerous conditional or qualified privileges are accorded based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interest, the interest of third persons, or the interests of the public. If such protection were not given the fear of persons capable of supplying such information that they might have to answer in damages would prevent its communication. Each such privilege is conditional upon the existence of a state of facts which make it in the public interest to protect the person speaking or writing, even though an individual may be defamed as a result. If the conditional privilege is abused by the writer or speaker it is lost and he must answer for the legal consequences of his publication.

Id. at 793 (footnotes omitted). The privileges identified were not constitutional creations; rather the court relied upon traditional tort concepts to construct these defenses.[4] *See id.* nn. 1-5.

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4. The *Francisco* decision was issued just weeks after this Court handed down *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). The Alaska court made no reference to it.

Two years later in *Pearson v. Fairbanks Publishing Co., Inc.*, 413 P.2d 711 (Alaska 1966), the Alaska Supreme Court revisited the privileges it recognized in *Francisco*. The court went on to explain the purpose and scope of its pubic "public concern" privilege:

> On the one hand there is the interest in safeguarding the right to one's reputation. On the other hand there is the interest in allowing freedom of debate and expression on public questions and issues. We believe that a fair balance of these competing interests is achieved where the law of defamation permits one, without liability for damages, to comment, criticize and pass judgment on statements made by another on an issue or matter of public interest, even if such comment, criticism and judgment involves misstatements of fact — so long as such misstatements are relevant to the subject matter spoken or written about by the one claiming to be defamed and are not shown by him to have been made with actual malice.
>
> . . . .
>
> We are aware of the fact that where matters of public concern are involved the majority of the courts hold that the privilege of public discussion does not extend to misstatements of fact but is limited to opinion, comment or criticism based upon a true statement of fact. We do not follow the majority rule, but hold that the privilege extends to non-malicious misstatements of fact. The distinction between a fact statement and an opinion or comment is so tenuous in most

> instances, that any attempt to distinguish between the two will lead to needless confusion. The basis for the privilege is that it is in the public interest that there be reasonable freedom of debate and discussion on public issues. One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as inferring, if not actually amounting to, a misstatement of fact.

Id. at 713-14 (footnotes omitted). Although the court adopted the *New York Times* "actual malice" standard for determining whether the "public interest and concern" privilege was abused, *id.* at 715, it did so with a clear understanding that the source of the privilege was Alaska's own common law. *See Taranto II*, 992 P.2d at 1115.

It was in this context that the *Taranto II* court extended the privilege afforded speech on matters of public concern to government speech. The Alaska Supreme Court first reviewed the more narrow (and traditional) governmental privilege reflected in the Restatement (Second) of Torts § 598A (1977) and previously recognized in *Urethane Specialties, Inc. v. City of Valdez*, 620 P.2d 683, 689 (Alaska 1980):

> An occasion makes a publication conditionally privileged if an inferior administrative officer of a state or any of its subdivisions who is not entitled to an absolute privilege makes a defamatory communication required or permitted in the performance of his official duties.[5]

5. The Restatement standard for abuse of this privilege is equivalent to the "actual malice" standard. Restatement (Second) of Torts § 600 (1977).

Taranto II, 992 P.2d at 1114. The court concluded that this privilege alone would justify affirmance of summary judgment in favor of NSB:

> Applying the *Urethane Specialties* analysis to this case would require us to affirm the borough's summary judgment. There are no genuine factual disputes about whether the petition concerned matters of public interest, whether the borough acted without actual malice, and whether the persons whose conduct is attributed to the borough acted with authority or permission.

Id.

Recognizing that the question of the speaker's authority under the Restatement (Second) of Torts § 598A (1977) might prove a troublesome issue in another context, the Alaska Supreme Court next revisited the "public concern" privilege it established in *Francisco* and *Pearson* more than twenty years earlier.

> We read *Francisco* and *Pearson* to stand for the core proposition that speech on matters of public safety is privileged, but that this privilege is conditional and can be lost if the plaintiff proves that the speaker uttered untruths with actual malice. Thus, these cases cloak speakers addressing matters of public health and safety with the actual malice conditional privilege. This protection will necessarily extend to a speaker's employer who is alleged to be vicariously liable for its employee's defamatory speech.

Taranto II, 992 P.2d 1115 (footnote omitted). It was on this basis, as well, that the Alaska Supreme Court affirmed the Superior Court decision, which: (1) imposed the "actual malice" standard on Taranto's defamation claim against NSB; and (2) ultimately dismissed it for lack of evidence.

The decision of the Alaska Supreme Court in *Taranto II* is founded *only* upon principles of Alaska common law. Because it is based entirely upon independent and adequate state law, this Court must reject the Petition for lack of jurisdiction under 28 U.S.C. § 1257(a). Alaska common law principles and their application are not the proper subject of review by this Court.

III. In *New York Times Company v. Sullivan* this Court Recognized the Propriety and Necessity of the Common Law Privileges Relied Upon by the Alaska Supreme Court in *Taranto II*

The central premise of Taranto's Petition is that the exercise of common law privileges by the Alaska Supreme Court somehow offends *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Pet. Br., pp. 4-10. In fact, Justice Brennan gave thoughtful consideration to the various privileges and immunities available in defense of government speech and weighed them against a citizen's constitutional right to criticize his or her government. 376 U.S. at 282-83. That balance was struck by the "actual malice" standard.

> [A] privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564, 575, this Court held the utterance of a federal

> official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*, *supra*, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California*, 274 U.S. 357, 375 (concurring opinion of Mr. Justice Brandeis), quoted *supra*, p. 270. As Madison said, see *supra*, p. 275, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

376 U.S. at 282-83 (footnotes omitted).

The Alaska Supreme Court's decision in *Taranto II* did not convert "what has been a careful balance and shield of individual speech . . . to a sword which can be wielded with impunity by government against its own citizens." Pet. Br.,

p. 5. Rather, the court maintained the careful balance of expression between the government and its citizenry, which rests at the very foundation of *New York Times Company v. Sullivan*. This Court afforded protection to critics of public officials, in part, because government officials already spoke with the benefit of various privileges and immunities. Preserving that balance is also a compelling reason to deny Taranto's Petition.[6]

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6. It is worthy of note that Alaska statutes specifically prohibit defamation actions against the State of Alaska, while conditionally permitting them against governmental subdivisions, like NSB. Alaska Stat. § 09.50.250(3). NSB is afforded immunity for its discretionary actions under Alaska Stat. § 09.65.070(d)(2). The utility of that defense under the circumstances of this case was not resolved on its merits, owing to summary judgment on other grounds. In any case, it seems axiomatic that if the State of Alaska may statutorily maintain complete immunity against defamation claims, its courts may impose limits on the conditional claims authorized against its units of local government.

CONCLUSION

For all of the forgoing reasons, NSB respectfully requests that Taranto's Petition for a Writ of Certiorari to the Alaska Supreme Court be denied.

Respectfully submitted,

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